How to Return from a Hybrid Regime to Constitutionalism in Hungary

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Since 2010, key elements of constitutionalism, such as the rule of law and democracy have been continuously eroding in Hungary. According to recent polls, however, the united opposition might have a chance to win the 2022 general elections and to end this worrisome trend. But even if they win (which is uncertain itself), it is very unlikely that they would receive enough votes to achieve a two-thirds constitution-amending majority in the Hungarian Parliament. The question is, how they then will be able to deal with the new situation, as the Constitution (called Fundamental Law) and the cardinal (i.e. two-third majority) laws entrench the values, the political rhetoric and the political preferences of the current government. Most of the supposedly independent institutions (such as the Constitutional Court, the prosecutorial services etc) are in fact captured institutions protected by 2/3 majority, and there is a danger that they will act as a deep state of the ancien régime countering the new government.

1. The nature of the Hungarian hybrid regime

By now, according to most democracy indices, Hungary is not a fully-fledged (well-functioning, consolidated, embedded) democracy – but not a dictatorship either.[1] It is something in-between in the grey zone: an "electoral autocracy" (V-Dem), a "partly free" country (Freedom House) or a "defective democracy" (Bertelsmann Transformation Index). In the following, I am going to use the expression "hybrid regime", as this seems to be the most generic, fitting and widespread terminology for such cases.[2]

An essential feature of the Hungarian regime is "plausible deniability", i.e. it is not using open and brutal methods of oppression, and also legal rules in most cases remain within the limits of Western constitutionalism (with a few exceptions, which only explain a minor fraction of the erosion). There is no legal rule which would explicitly exclude the opposition from winning the elections, but a series of nasty and mostly illegal tricks (biased application of campaign finance laws, state-run propaganda machine, using the secret services to spy on opposition politicians etc) make the playfield uneven and unfair.

The nature of the regime cannot be understood based on its legal rules, as the typical modus operandi is exactly the biased application of laws. Law enforcement agencies do not apply existing criminal laws to obvious corruption cases if they happen in the environment of the PM. We can observe a growing gap between written laws and legal reality: the normativity of formal legal norms is slowly deteriorating in Hungary (especially in politically sensitive legal areas) and informal extra-legal practices become stronger and stronger, often also contrary to existing laws.[3] The forms are still there, but slowly they are being hollowed out. Captured institutions (such as the Constitutional Court or the prosecutorial services) are independent on paper, but in fact they act along the wishes of the current government.

[1] Simplistic binary descriptions about Hungary (democracy vs dictatorship) are unsuitable for academic purposes. For sophisticated evaluations you need graded systems, such as rule of law indices, see András Jakab & Lando Kirchmair "How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way" (2021) *German Law Journal* 22:6, 936-955.

[2] For further references on the terminological debate see András Bozóki & Dániel Hegedűs, "An externally constrained hybrid regime: Hungary in the European Union" (2018) *Democratization* 25:7, 1173-1189. They characterise the Hungarian hybrid regime with „the presence of one-sided and unfair political competition as well as the formal existence of a liberal constitution but with serious deficiencies in its actual functioning."

2. A realist and responsible way out

Dismantling the hybrid regime is not an easy task, if you do not have 2/3 majority in the Parliament. There is no Gordian knot that you can simply cut, you need to go a long and tiring way in order to return to constitutionalism. But such a legal and peaceful transition is possible in the following three steps:

(a) First, once you have a new government, the practice of abusing the central state administration for party political purposes can cease (primarily by appointing new leaders for the tax authority, the police and the secret services). The new parliamentary majority can also enact a number of simple majority laws reforming the school system or the health care system. The arbitrary financial support of small villages (resulting in blackmailing them to secure almost full electoral support) can also immediately be corrected. The new government can immediately publish materials about a number of secret (and most likely illegal and corrupt) deals of the ancien régime. They can take a new foreign policy approach towards a more EU- and NATO-friendly direction (instead of serving Russian and Chinese interests). Very importantly, the new government can just stop misappropriating EU and national funds (which mostly happens through centrally organised overpriced public procurements).

The possibilities of the new government are indeed smaller than what they should be under normal democratic circumstances (e.g. concerning the administration of universities), but still very wide-ranging. Once the new government is in the hands of the opposition, Fidesz cannot use the central state administration for winning local government elections or European Parliament elections any more (the propaganda machine is very expensive, the stolen money and the resources controlled by the deep state are insufficient). Unless the new government gets suicidal (internal fights etc), it will be downhills for Fidesz.

Fidesz officials are often depicted as fanatics (there are indeed a few such loyalist officials, but this is according to my perception very uncharacteristic), whereas they are in fact only making opportunist compromises continuously. Most Fidesz officials just want to survive, therefore their informal loyalty will necessarily fade step by step, especially with every (local government, European Parliament etc) electoral defeat. Paradoxically, Fidesz voters believe much more in the ancien régime than the officials who actually run it. The nearer you are to the reality of the Fidesz government, the more you see from the kleptocratic and cynical practices. This is an important difference between Poland and Hungary that many Western observers fail to recognise: most Polish PiS top-officials actually believe in their own regime's moral claims, whereas most Hungarian Fidesz top-officials do not.

The new government needs to make it clear that it is not expected from Fidesz-appointed officials (in independent institutions and in ministries) to swap political sides, they are "only" required to do their jobs as prescribed by law in good faith (the latter is always an implied legal requirement anyway). The purpose should not be to mirror to "them" what happened to "us", the Schmittian logic would be highly detrimental.

(b) Second, at a later stage (most likely first after yet another parliamentary election) a 2/3 majority may be formed, and hence constitutional amendments (and amendments to cardinal laws) will become possible. Transitional justice measures (including recovering assets that were acquired in corrupt practices) can be done either already in the first phase with simple majority, or (for those cases where 2/3 majority laws need to be changed) in this second phase.

(c) Third, as a final step, after a few years, you can go for a new constitution. It should happen in a legal way, and it should include all relevant political actors (possibly also Fidesz or future right-wing parties with real and broad support from right-wing voters). Amendments and re-interpretation can in the meantime change any constitutional content (concerning governability or symbolic issues), just like we have seen in 1989 and thereafter in Hungary. Adopting a new constitution can be the final symbolic touch in the

[3] András Jakab, "Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules. The Failure of Constitutional Institution-Building in Hungary" (2020) *American Journal of Comparative Law* 68:4, 760-800.

transitional process, but pushing the issue from the beginning is counter-productive. Or to be poetic, the new constitution is the fruit of a successful transition process, one of the very last steps, and not a tool at the beginning of the journey.

3. Losing Rationality and Playing with Matches: Revolutionary Promises of Instant Solutions

The above described way is lengthy, tiring, and full of small-print. Revenge-hungry politicians and angry voters, however, prefer theatrical solutions, supported with bold campaign slogans. In Hungary, the current menu of false constitutional promises about quick and simple solutions for the transition is long. Some of them are doctrinal and mistakenly refer to the concept of unconstitutional constitutional amendments (even though in Hungary there was never a higher layer of constitutional law, such as the *Ewigkeitsklausel* in Germany) or to the "right of resistance" (which was borrowed from Art 20 of the German *Grundgesetz* and was only meant as a symbolic provision). Some of them suddenly discover procedural mistakes in the 2011 adoption of the Hungarian Fundamental Law (even though there were none that would have influenced the validity of the Fundamental Law). Yet others refer to natural law, e.g. Radbruch, and pretend that the Hungarian regime is a full-blown dictatorship (which it is not, as it is a hybrid regime). All these proposals try to justify why the 2/3 entrenchment rules could simply be disregarded, and therefore why a break in legal continuity (i.e. a Kelsenian revolution) is the way out.

Common to the revolutionary ideas are the following:

(1) They imply that the legal structure entrenched by 2/3 majority is the main problem, and therefore the way towards constitutionalism leads through breaking legal continuity. This is a serious misunderstanding as we have seen above, an essential feature of the current Hungarian hybrid regime is exactly that it is run *contrary to its own legal system* (which has been used to a large extent as a liberal façade covering illiberal practices). Obeying existing rules and applying them in a non-arbitrary manner would already mean huge improvements for the quality of the rule of law. Even though there are indeed some legal rules that need to be changed, the majority of them are in simple ordinary statutes (not entrenched by 2/3 majority).

If the deep state of the ancien régime is trying to topple the new government illegally (e.g. via the budget veto power of the Budgetary Council, or if the President of the Republic is unwilling to promulgate the new laws), then the ancien régime is losing the legality argument, and they themselves enable the revolutionary changes by the new government. If they do try to topple the new government, then it would necessarily be illegal (with the right interpretation of the relevant constitutional norms). The legally acceptable means of the deep state of the ancien régime are actually very limited for toppling the new government. In such a case, the blame for breaking the legal continuity would lie clearly with the ancien régime (and also the blame for any physical violence). We cannot exclude such a scenario, but I think (and I hope) that it is less likely than it is generally feared.

(2) They are unwilling and/or unable to give an answer to practical questions about *how* to implement the changes without massive violent social unrest. According to any prediction, even if Fidesz is losing the next elections, almost half of the electorate will still support them. Any attempt to illegally amend the Constitution and to enforce this against the Constitutional Court can effectively be countered by the prosecutorial services (as such acts would actually be crimes if they were physically enforced, and those trying to implement them, except for the MPs, could immediately be arrested). If the new government pushes the issue, then sooner or later the country will have two parallel legal systems. According to the old legal system, the revolutionary new government should be arrested, whereas according to the new legal system, members of the deep state will need to be arrested. There is a good chance that the police, the secret services and the army would also be split according to who would follow which legal system. The situation then easily could escalate into unimaginable violent scenes (not just violent street protests, but with armed forces and casualties on both sides) that we have only

seen so far outside of the European Union – with no perspective for a peaceful solution. Revolutionary proponents of instant radical solutions are offering Jacobin moralist arguments about the evilness of the old legal system and enthusiastic political slogans about a bright future under the new Constitution, but they are staying silent about the most likely outcome of their plans: massive armed violence.

Organising a referendum does not solve any of these problems either. First of all, it is illegal to organise referenda on constitutional amendments in Hungary (this rule itself is entrenched by 2/3, and this has been the case for a long time in Hungarian law, even before the Fundamental Law). Therefore such a referendum could only be organised after legal continuity has been broken (in order to "heal" the illegality), but the practical and most likely violent problems will appear before you could have a referendum. And second, in highly polarised societies (such as the Hungarian), referenda with binary questions tend to make polarisation and social conflict even worse.

(3) They are unwilling to consider that their plans will most probably contradict EU law and the ECHR. We sadly got used to it that under the current Fidesz government Hungary is regularly breaching international and EU law. But it is shocking to see that some opposition politicians are similarly disrespectful towards these obligations (and justify this by referring to the fact that the Fidesz government has done the same and they are just trying to counter it).

The Hungarian situation is different from the Polish one in this respect. In Poland, the Constitutional Tribunal is actually not a "tribunal established by law" according to Art 6 ECHR, or to put it more bluntly, it is at least partially an illegal court (ECtHR Xero Flor v Poland, 7 May 2021), therefore any new government could take measures against it without violating the ECHR or EU law. The Hungarian Constitutional Court is, however, a "tribunal" in the sense of Art 6 ECHR (and also according to Art 47 EU-CFR). What is more, its procedures have so far been qualified as effective remedy by the ECtHR, see Mendrei v Hungary (15 October 2018) and Szalontai v Hungary (4 April 2019). This is an additional indirect limit by EU law and by the ECHR on any plans breaking legal continuity in Hungary. The only honest words concerning such worries so far came from the former minister of justice Péter Bárándy who admitted that breaking legal continuity could be in violation of EU law, but he suggested that the revolutionary plan should still be implemented ("Maybe in three or four years the ECJ would condemn us. This should be our biggest problem.").

(4) They suppose that Fidesz officials are all mindless droids. Some of the Fidesz officials would probably be relieved that they can now actually do their job, others would consider future career prospects, and yet others would indeed try to illegally sabotage the new government. We do not know, and we *cannot* know exactly, but the deep state will definitely be much less effective than hoped by Fidesz (or feared by the current opposition). But even if I am wrong (I believe I am not), you should at least first *try* the non-revolutionary way of the transition.

Breaking legal continuity is an existing possibility (and in legal history, a number of constitution-making processes were indeed illegal), but in the Hungarian context according to what we know about the regime today, it is just not worth to take this path and it cannot be justified by the current state of the Hungarian legal system, being the legal system of a hybrid regime. You do not need to like the content of the current Hungarian legal system, but before jumping into chaos you should consider whether the likely gain by a radical step would be proportionate to the likely social cost.

Breaking legal continuity would not be a step towards Strasbourg and Brussels, but yet another step away, more towards Kiev and Tbilisi. The likely social cost of severe violent (and armed) conflict and the risk of future breaks of legal continuity (basically after each election) make such a path a highly irresponsible choice. One can only hope that opposition politicians will come to their senses before it is too late.

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